United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/941
19 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 941

Case No. 1026: KIWANUKA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha Echols;

Whereas at the request of Samuel Kiwanuka, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 January, 30 April and 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 17 July 1998, the Applicant filed an application requesting the Tribunal, *inter alia*:

"*... Pleas*

7. With respect to competence and procedure ...

...

(d) *To order* production of the reply of the Chairperson, JDC [Joint Disciplinary Committee] to the memorandum of 9 July 1997 from the Under-Secretary-General for Administration and Management.

8. On the merits ...

(a) *To rescind* the decision of the Secretary-General summarily dismissing the Applicant;

(b) *To order* that the Applicant be immediately reinstated with full salary and benefits from the date of his separation from service;

(c) *To find and rule* that the manner in which the Office of Internal Oversight conducted its investigation of the Applicant [was] procedurally flawed and violated his right to due process;

(d) *To find and rule* that the suspension without pay of the Applicant for ten months was arbitrary, based on hearsay and exceeded the discretionary authority of the Secretary-General;

(e) *To find and rule* that the lengthy delays in and the reopening of the Joint Disciplinary Committee proceedings violated the Applicant's right to a timely and fair hearing;

(f) *To find and rule* that the Applicant's right to due process and a fair hearing were violated by the Respondent's *ex post facto* submission of totally irrelevant material to the JDC on behalf of the Office of Internal Oversight;

(g) *To find and rule* that the decision by the Under-Secretary-General for Administration and Management to impose summary dismissal after the Joint Disciplinary Committee had exonerated him of all the allegations made against him was procedurally flawed, arbitrary, improperly motivated and based upon mistakes of law and of fact;

(h) *To adjudge and declare* that the decision of the Respondent to reject the conclusions of the Joint Disciplinary Committee, which exonerated the Applicant of any wrongdoing, was unsupported by the evidence, occasioned a failure of justice and should be rejected;

(i) *To order* that in addition to reinstatement the Applicant be awarded damages in the amount of three years' net base pay for the violation of his rights and for the resulting damage to himself, his family and his professional reputation."

Whereas the Respondent filed his answer on 11 June 1999;

Whereas the Applicant filed written observations on 3 November 1999;

Whereas, on 8 November 1999, the Respondent submitted an additional statement;

Whereas, on 3 November 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 6 August 1993, in the Field Administration and Logistics Division, Department of Peace-keeping Operations (DPKO), on a one-year fixed-term appointment at the P-3 level as Deputy Chief Finance Officer, United Nations Peace-keeping Force in Cyprus (UNFICYP). His functional title was changed to Chief Finance Officer (CFO) on 6 February 1994. He received further extensions of his fixed-term appointment, through 31 May 1997. On 1 July 1996, he was suspended without pay pending the resolution of charges of misconduct which had been brought against him. In April 1997, this was converted to suspension with pay, retroactive to 1 December 1996. He was summarily dismissed with effect from 19 July 1997.

On 1 July 1996, the Officer-in-Charge, Procurement Section, UNFICYP, wrote to the Officer-in-Charge, Administration, reporting that someone had tampered with the Procurement Section's computer program for ration requisitioning. He stated, *inter alia*, as follows:

> "...
>
> 3. ... the changes done [are] not consistent with a typo from my side and I would have had no reason to [make such changes], I find it very odd ... [S]omehow a person knowing the procedure of ordering ha[s] entered the rations order program and deliberately changed the files. ...
>
> 4. ... I feel someone intentionally [has] tried to discredit me and my duties in the section and therefore request your assistance to investigate the matter ... If

> necessary relieve me from responsibilities within the section ... until the matter [has] been resolved and further, that for security reason changes be made immediately within the system so that a similar incident cannot occur in the future."

On 2 July 1996, a Captain of the Irish Independent Defense Force serving as the Force Catering Officer (FCO), UNFICYP, submitted a hand-written Witness Statement, making a number of allegations. On 6 May 1996, the CFO instructed him to make a change in the standard operating procedures for procuring rations for the duty station, asking him to certify that "the invoices were correct [before forwarding them to the CFO] for payment". On 11 May 1996, the FCO met with the former FCO, who was visiting Cyprus, who told him: "there was money to be made as the Force Catering Officer" and cited as an example " that his car had been paid for by a contractor". On 12 May 1996, the FCO was taken by the former FCO and the CFO in the latter's car to a warehouse of a supplier of fresh produce, informed by them about a "system they had operated for a period of time without any detection" and asked to participate in the scheme which involved submission of "false invoices to the Chief Finance Officer [the Applicant] who subsequently issued monies for these false invoices without detection." The FCO was told that his cooperation was necessary for the scheme to continue and offered a monthly payment. On 13 May 1996, the FCO was given a number of false invoices by the CFO, despite his insistence that he did not want any part in the scheme. The FCO also alleged that he taped the conversation in the supplier's warehouse during the 12 May meeting and that he gave the tape to the Force Provost Marshal, UNFICYP, on 2 July 1996.

On the same date, 2 July 1996, the Chief Administrative Officer, UNFICYP, sent a fax to the Under-Secretary-General, DPKO at Headquarters, attaching the two above-mentioned documents dated 1 and 2 July 1996, stating that it was of the "utmost urgency to secure all possible evidence contained in records or computerized files" and it "would be greatly appreciated if a qualified investigator could be sent to UNFICYP immediately."

On 3 July 1996, the Director, Field Administration and Logistics Division, sent a

copy of the fax from the Deputy Special Representative of 2 July 1996 to the Chief, Investigations Section, Office of Internal Oversight Services (OIOS), requesting that an investigator be dispatched as soon as possible.

Also on 3 July 1996, the Officer-in-Charge, DPKO, reported the case to the Assistant Secretary-General, Office for Human Resources Management (OHRM), in accordance with paragraph 3 of ST/AI/371, and recommended, in view of the gravity of the accusations, that the Applicant be suspended without pay with immediate effect.

On 4 July 1996, the Force Commander and Acting Chief of Mission, UNFICYP, informed the Applicant that "serious allegations [had] been levelled against [him] that [he was] directly involved in an on-going scheme to defraud the Organization in connection with the procurement of food rations by UNFICYP from a local contractor" and that in view of the serious nature of allegations and in the interest of the Organization, the Secretary-General had decided that he be placed on suspension from duty without pay pending investigation, for a probable duration of three months, without prejudice to his rights.

On 24 July 1996, an "Investigation Team" travelled to UNFICYP and conducted a four-day investigation into the allegation. (The team returned in September 1996 for four days to finalize the investigation).

On 30 July 1996, the Applicant requested administrative review of the decision to suspend him without pay.

On 3 October 1996, OIOS submitted its report. In his covering memorandum of the same date to the Under-Secretary-General, DPKO, the Under-Secretary-General, OIOS, indicated that the evidence adduced by the investigation, which included interviews and an analysis of the records, confirmed the allegations of serious wrongdoing on the part of the Applicant, the former Force Catering Officer and a supplier of fresh fruit and vegetables.

On 25 October 1996, the Director, Specialist Services Division, OHRM, forwarded the OIOS report to the Applicant. She informed him that, on the basis of this report, he was charged with "engag[ing] in a scheme to defraud the United Nations by the misappropriation

of [fresh fruit and vegetables] ration funds." The Applicant was asked to respond to the charges within two weeks, and notified of his right to counsel. He was also informed that the Secretary-General had decided to extend his suspension without pay for a further three months as from 4 October 1996.

On 31 October 1996, the Applicant wrote to the Joint Appeals Board requesting a stay of action, and appealing the decision to suspend him from duty pending investigation.

On 15 November 1996, the Applicant replied to the charges of misconduct. Denying that he had ever been part in any scheme to defraud the United Nations, he claimed that the allegations made by OIOS were false and that some of the statements made by the FCO were "completely untrue". He also claimed that OIOS violated the Staff Regulations and Rules and denied him due process.

On 4 December 1996, the Assistant Secretary-General, OHRM, informed the Applicant that he had decided to refer the matter to a Joint Disciplinary Committee (JDC) for advice, and advised him of his rights under the applicable provisions of administrative instruction ST/AI/371.

On 8 January 1997, the Assistant Secretary-General, OHRM, requested the Secretary of the JDC to consider the case on an expedited basis, in view of the sensitive nature of the case and the fact that the Applicant had been suspended from duty without pay for over six months.

On 13 January 1997, the Applicant's suspension without pay was again extended on a month-to-month basis, through the completion of the disciplinary proceedings.

On 7 April 1997, the Applicant was informed that the Under-Secretary-General for Administration and Management had decided to convert his suspension *without* pay to suspension *with* pay, retroactive to 1 December 1996.

On 15 May 1997, the Applicant requested that the effective date for conversion to suspension with pay be changed retroactively to 4 July 1996.

The JDC submitted its report on 22 May 1997. Its conclusion and recommendation read as follows:

> "XIV. ...*CONCLUSION*
>
> 109. The Panel concludes that there has been no credible evidence presented that [the Applicant] had participated in or received any benefits from acts of misconduct against the United Nations.
>
> XV. ... *RECOMMENDATION*
>
> 110. The Panel recommends to the Secretary-General that the charges against this staff member be dropped; that the case be closed and that the staff member be reinstated with proper and appropriate compensation in order to mitigate any damages he may have suffered as a result of the charges which had been levied against him."

On 12 June 1997, the Under-Secretary-General for Administration and Management, addressed letters in similar terms to the Applicant and the Under-Secretary-General, OIOS, asking both parties whether there was any additional information they wished to provide.

On 16 June 1997, the Applicant responded that he felt that the JDC "took into account all of the facts and supporting evidence ... submitted to them ... [and that he was] not aware of any additional facts ... that [had] not been submitted to the JDC".

On 7 July 1997, the Under-Secretary-General, OIOS, responded to the Under-Secretary-General for Administration and Management's inq... and transmitted to him an additional 11-page report with various attachments pertaining to forensic analysis of the tape submitted by the FCO.

On 9 July 1997, the Under-Secretary-General for Administration and Management forwarded to the Chairperson, JDC, the replies received from the Applicant and from OIOS. He drew the Chairperson's attention to the results of the forensic analysis, which he said had been conducted only after the JDC had completed the case. He asked for any additional

views the Committee might have in light of this new information.

On 14 July 1997, the Applicant submitted to the JDC further comments on the OIOS additional report.

On 18 July 1997, the Under-Secretary-General for Administration and Management, informed the Applicant as follows:

> "...
>
> The Secretary-General has examined your case in the light of the Committee's report, additional information subsequently brought to his attention, the Committee's memorandum of 18 July 1997, as well as on the basis of the entire record, including all the statements made by you and by your Counsel on your behalf. He does not, however, share the Committee's conclusions and recommendations.
>
> The Secretary-General notes that three forensic experts have concluded that there is no evidence that the tape which implicates you in a conspiracy to defraud the United Nations by the misappropriation of rations funds is other than a genuine recording which has not been altered or tampered with in any way. ...
>
> In the view of the Secretary-General, the [genuineness] of the tape is also supported by testimonies of others who participated in the taped conversation and by the evidence of efforts that you made to conceal over expenditures of rations funds through misleading statements. It is also supported by the fact that the amounts invoiced by the contractor for the fruit and vegetables exceeded the requisitioned amounts.
>
> The Secretary-General is not in a position to accept the Committee's statement ... that 'only an audit performed by an independent party or entity might have had credibility in such matters' and that 'it would have been speculative for [the Committee] to have given credence to financial information which had been offered [by OIOS] without reasonable assurances that it had been accurate'. The Secretary-General wishes to point out that OIOS exercises operational independence and its mandate provides it with the authority to undertake internal audits, which OIOS indeed conducted in connection with your case.
>
> The Secretary-General has thus concluded that the charges are well-founded and that your actions constitute serious misconduct. The Secretary-General in

choosing an appropriate penalty has been influenced by the fact that you were the Chief Financial Officer of UNFYCIP and that you have abused a position of responsibility and trust. He has, therefore, decided to summarily dismiss you pursuant to staff regulation 10.2, paragraph 2, and staff rule 110.3 (a) (viii) with effect from 19 July 1997. ..."

On 17 July 1998, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The preliminary investigation by the OIOS violated the Applicant's rights to due process and fair treatment.

2. The Applicant's suspension without pay for over ten months was unauthorized, unjustified, improperly motivated and harmful to him and his family.

3. The disciplinary proceedings were tainted by delay, improper procedure and denial of due process.

4. The final decision to reject the findings and conclusions of the JDC in order to summarily dismiss the Applicant was improper and ill-founded.

Whereas the Respondent's principal contentions are:

1. The investigation into the allegations against the Applicant was not improperly motivated, and the Applicant's due process rights were respected.

2. The Applicant's suspension was a proper exercise of the Respondent's discretion.

3. The Respondent is not bound to accept the conclusions and recommendations of the JDC. The decision to summarily dismiss the Applicant was a valid exercise of the Respondent's disciplinary authority.

The Tribunal, having deliberated from 3 to 19 November 1999, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 18 July 1997, rejecting the JDC recommendation to exonerate the Applicant from charges against him, and instead summarily to dismiss him under the terms of staff rule 110.2. The Applicant claims that the Respondent improperly exercised his discretionary authority in rejecting the findings and recommendation of the JDC. He further claims that the Respondent's disciplinary proceedings were tainted by delay and improper procedure, which together constituted a violation of his right to due process and fair treatment.

II. The case concerns the imposition of a disciplinary sanction. As early as 1953 (Judgement No. 29, *Gordon*) the issue of disciplinary measures engaged the attention of the Tribunal. The jurisprudence on the subject has developed considerably since then. The Tribunal has made a variety of general statements. Many of these have been determined by the issues arising in the case before the Tribunal. For example, in Judgement No. 583, *Djimbaye*, paragraph VI (1992), it was said that "... in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors." (Cf. Judgements No. 351, *Herrera*, para. VII (1985); No. 529, *Dey*, para. V (1991); No. 582, *Neuman*, para. III (1992); and No. 584, *Adongo*, para. I (1992)). In its jurisprudence, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision." (Judgements No. 300, *Sheye*, para. IX (1982); and No. 210, *Reid*, para. III (1976)).

In Judgement No. 479, *Caine*, paragraph III (1990), the Tribunal clarified and

expanded this somewhat. The Tribunal will intervene when the administrative action is "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact". (Cf. Judgement No. 641, *Farid*, para. IV (1994)).

III. The jurisprudence thus has been developing and definitions have been refined. In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive. Most recently in Judgement No. 898, *Uggla*, paragraph II (1998), the Tribunal made a similar general statement.

IV. Clearly the Tribunal takes the view that the imposition of disciplinary sanctions involves the exercise of a discretionary power by the Administration. It further recognizes that, unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. The Administration's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily.

V. In regard to (i) in paragraph III above, the Tribunal makes a judgement based on its examination of the facts. In regard to (ii) in paragraph III above, the Tribunal judges

whether the characterization of misconduct or serious misconduct is, in its opinion, appropriate, which is a matter of law.

VI. In connection with (i), the Tribunal has in the past used such descriptions as "mistake of fact" (Judgement No. 529, *Dey*, para. VII (1991)), "supported by cogent evidence" (Judgement No. 928, *Abdul Hadi et al.*, para. IX (1999)) "ample evidence to justify" (ibid., para. III), "conclusions supported by evidence (Judgement No.756, *Obimba*, para. II (1996)), "allegations are well founded" (Judgement No. 797, *Bouras*, para. VIII (1996)), "ample evidence for JDC to conclude" (Judgement No. 897, *Jhuthi*, para. IV (1998)), and "evidence supports conclusions" (Judgement No. 830, *Anih*, para. V (1997)). What the Tribunal must examine is whether the findings of fact against the Applicant made by the Administration can be supported by the evidence on the record. Without substituting its own judgement for that of the Administration (cf. Judgements No. 490, *Liu* (1990), and No. 616, *Sirakyan* (1993)), it makes a judgement on whether the findings of fact are reasonably justifiable and supported by the evidence. If the Tribunal judges that the material findings of fact cannot be supported by the evidence, it may disagree with the conclusions of the Administration based on the evidence. Needless to say, the Tribunal examines the facts and the evidence critically and fully and reviews the Administration's decision.

VII. In regard to (ii), in paragraph III above, i.e. determining whether the established facts legally amount to misconduct or serious misconduct, the Tribunal will in its review decide whether it agrees that the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization. For example, in Judgement No. 927, *Abdul Halim et al.* (1999), with regard to the Applicant Husary, the Tribunal held that an error of judgement on the part of the Applicant resulting in loss of confidence on the part of the Commissioner-General of UNRWA would not be characterized as misconduct.

VIII. On 25 October 1996, the Applicant was asked to respond within two weeks to allegations of misconduct. After receiving the Applicant's rebuttal of the allegations, the Respondent decided to submit the case to the JDC for a recommendation. The unanimous recommendation of the JDC, on 22 May 1997, was that no disciplinary measures be taken against the Applicant and that he should be awarded "proper and appropriate compensation in order to mitigate any damages he may have suffered as a result of the charges which had been levied against him." On 18 July 1997, the Respondent issued the decision rejecting the JDC's findings.

Contrary to the JDC's recommendations to exonerate the Applicant from all charges made against him, the Respondent determined that the Applicant was guilty of the charges and summarily dismissed him. Central to the Respondent's decision to reject the JDC's findings was the probative weight of the tape recording evidence that implicated the Applicant.

The JDC's belief that "tape recordings can easily be edited, dubbed and/or altered" led to its conclusion that the tape recording might have been tampered with. The Tribunal has held that the burden of proof rests with the Respondent to produce evidence that raises a raisonable inference that misconduct has occurred. If a prima facie case is made, the Applicant must provide a proper explanation or evidence to rebut that case. Otherwise, the conclusion of misconduct could be reached (Judgement No. 897, *Jhuthi*, para. IV (1998)). The Tribunal finds that the Applicant's explanation that the tape recording lacked credibility or authenticity and had been tampered with was merely an unsubstantiated allegation that contradicted the evidence of experts.

IX. The Tribunal emphasizes further that the recommendations and conclusions of the JDC are advisory and need not be accepted by the Administration. The Respondent has the discretion to reach a different conclusion after consideration of all the facts and circumstances of the case. (Cf. Judgements No 494, *Rezene* (1990); No. 529, *Dey* (1991);

No. 551, *Mohapi* (1992); No. 582, *Neuman* (1992); No. 641, *Farid* (1994); and No. 673, *Hossain* (1994)).

X. Although it is within the Respondent's discretion to reject the JDC's recommendation and exercise disciplinary authority, disciplinary measures must be taken with regard to due process and fair treatment. The Applicant claims that the Respondent's handling of disciplinary measures and proceedings was tainted by delay, improper procedure and as a result violated his right to due process and fair treatment.

The Applicant argues that his suspension without pay for over ten months was unauthorized, improperly motivated, and exceeded the Respondent's discretionary authority. On 4 July 1996, the Applicant was suspended without pay pending the resolution of charges of misconduct which had been brought against him. On 7 April 1997, the Applicant was informed that the Under-Secretary-General for Administration and Management had decided to convert his suspension without pay to suspension with pay, retroactive to 1 December 1996. The Applicant was summarily dismissed with effect from 19 July 1997. For almost five months he was in effect suspended without pay.

XI. Staff rule 110.2 provides in its pertinent part that:

> "If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate."

Moreover, paragraph 5 of ST/AI/371 "Revised disciplinary measures and procedures" provides that:

> "On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether suspension is warranted. Suspension under the staff rule 110.2 (a) is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant suspension without pay, in both cases without prejudice to the staff member's rights."

The Respondent claims that the allegations against the Applicant were sufficiently serious, and the evidence substantial enough, to constitute "exceptional circumstances" in which suspension without pay was appropriate in light of the Applicant's position as Chief Finance Officer of UNFICYP. The Respondent expected that the investigation would be completed more quickly than it was. Furthermore, he expected that the JDC would have been able to complete its review of the case more expeditiously. When it became clear that there was likely to be no speedy resolution of the JDC case, and in view of the length of time the Applicant had been suspended without pay, the Under-Secretary-General for Administration and Management, decided on 1 March 1997 to convert the Applicant's status to suspension with pay, retroactive to 1 December 1996, the time of the decision to refer the case to the JDC.

XII. The Tribunal is of the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances. The discretionary authority of the Respondent to suspend without pay in exceptional circumstances is not absolute and must function within the requirements of due process and the pertinent rules and regulations (Judgement No. 388, *Moser* (1987)).

The Tribunal holds that the Respondent's decision to suspend the Applicant's salary for an extended period of time was unjustified. The qualifying factors surrounding the investigation made it clear that there were no circumstances which could be categorized as exceptional. The Respondent failed to take measures expeditiously to resolve the matter.

The Applicant's continued suspension from duty without pay was unnecessary. As a result, the Applicant was denied his right to due process.

XIII. In conclusion, the Tribunal holds that the Respondent had sufficient justification to conclude that there had been serious misconduct and summarily to dismiss the Applicant. However, the procedural flaws in the process resulted in the Applicant's unjustifiably prolonged suspension of duty without pay, which amounted to a denial of due process.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant an amount equal to six months of his net base salary, at the rate in effect on the date of his separation from service, as compensation for the damage done.

XV. All other pleas are rejected, including the request for the production of documents.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Marsha ECHOLS
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary